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# Formulation Policy Regarding the Smuggling of Lobster Seeds in Indonesia

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## Abstract

This paper analyzes how formulation policy of lobster seeds smuggling regulated in Indonesian law to optimize the effectiveness of illegal fishing enforcement, considering penal policy is the basis of criminal law operationalization. This research uses both statute approach and conceptual approach as legal research methods to analyze the issued legal problem. Fishery law in Indonesia regulated in Law No. 45 of 2009 amending Law No. 31 of 2004 concerning Fishery, especially Articles 88 and 16 paragraph (1) which cover the formulation policy of lobster seeds smuggling enforcement. This study will be analyzed into three aspects which are the conduct (the criminal offense), criminal liability, and sentencing system. The result shows that law enforcement regarding the smuggling of lobster seeds in Indonesia is ineffective due to the nonexistence of corporate criminal liability in the fishery law and its sentencing system is lack of both the specific minimum penalty regulation and the penal measures as criminal punishment. However, the draft of the fishery law has already set corporate criminal liability; hence it also regulates the penal measures, in the form of secondary sanctions. Nevertheless, instead of enacting the specific minimum penalty, the draft only determined the maximum penalty as well.

**Keywords:** Formulation Policy, Fishery Law, Lobster Seeds Smuggling.

## I. INTRODUCTION

Lobster seeds export in Indonesia becomes one of the controversial topics these days, mainly focused on the revocation of the export ban policy<sup>1</sup> proposed by Minister of Marine Affairs and Fisheries, Edhy Prabowo, whereas his predecessor, Susi Pudjiastuti, who regulated the export ban back then in 2016, opposed it.<sup>2</sup> The latter strongly rejected the proposal by providing data of Indonesia's domestic lobster exports compared to Vietnam's before and after the ministry issued the ban. The said data saw a significant rise as Indonesia's adult lobster exports collected US\$14.84 million in 2016, the export value in 2017 and 2018 also saw a rise with the former producing US\$17.3 million and the latter producing US\$28.4 million. Meanwhile, Vietnam saw theirs drastically dropping with 2015 generating US\$11.8 million; 2016 (US\$7.09

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<sup>1</sup> Under a 2016 ministerial decree, the government bans the catching of all lobster larvae – from spiny lobster *Panulirus spp.* to rock lobster *Jasus spp.*, the most common species in Indonesia – for any purpose. Fishermen can only catch lobsters that are not in egg-laying condition and have a carapace length of above 8 centimeters or weigh above 200 grams per animal, retrieved from Jakarta Globe, “Win Some Win-Lose Jokowi Greenlights Export of Lobster Larvae” online: <<https://jakartaglobe.id/business/win-some-lose-some-jokowi-greenlights-export-of-lobster-larvae>>.

<sup>2</sup> *Ibid.*

million); 2017 (US\$6.1 million); 2018 (US\$4.2 million).<sup>3</sup> On the other hand, The Minister argued that lifting the ban would produce more income for fishers and the government. He also stated that the export ban encourages rampant smuggling hence disrupt the sustainability of the lobster ecosystem.<sup>4</sup> In this paper, rather than revoke the export ban that is potentially damaging lobster seeds and its environment, the government shall review both the current fishery law and its draft, which are the formulation policy of lobster seeds smugglings to increase the effectiveness of lobster seeds smuggling enforcement.

Aside from the dissension of the lobster seeds export ban, this research will particularly analyze lobster seeds smuggling, one of the downsides of the export ban policy argued by The Minister, as illegal fishing by Indonesian law. Former ministry of marine affairs and fisheries, Susi Pudjiastuti, said illegal selling of lobster seeds would be a loss for fishers with its far lower price compared to mature lobsters. A lobster seed was sold at IDR 3.000, 10.000, and 30.000, while the price of a mature lobster is equal to the price of 30 kg, 40 kg, 50 kg of fish.<sup>5</sup> In 2019, the police had seized some 1.6 million lobster seeds valued at some IDR 260 billion.<sup>6</sup> Moreover, the Financial Transaction Reports and Analysis Center (PPATK) has detected between IDR 300 billion and IDR 900 billion (\$21-24 million) of fund transfers from abroad allegedly used in financing the smuggling of lobster seeds in 2019.<sup>7</sup>

As one of the biggest lobster seeds producing countries, the smuggling of lobster seeds act not only made Indonesia suffered financially but also environmental loss. Several cases of lobster seeds smuggling occurred until the last December indicated that Indonesia is still struggling in combating it. The said cases are described below:

Aviation Security (Avsec) officers at Soekarno Hatta International Airport foiled the attempted smuggling of 125,619 lobster seeds, believed to be pearl and sand lobsters, which is estimated to be worth IDR 19 billion (US\$1.31 million). The smuggling attempt was prevented after Avsec officers grew suspicious of four suitcases in the baggage handling area. When the suitcases passed through the X-ray machine, it looked like they were packed only with clothes. After checking them three times, the officer confirmed that there were indeed living organisms inside them. Two Indonesian passengers, identified as ER and RW, are listed as the suitcases' owners, and they could be charged under the Fisheries Affair Law and face a maximum of six years in prison and fines of IDR 1.5 billion if found guilty.<sup>8</sup>

<sup>3</sup> Tempo, "Susi Pudjiastuti's Data Shows Potency Of Lobster Seeds Export Ban" online: <<https://en.tempo.co/read/1285930/susi-pudjiastutis-data-shows-potency-of-lobster-seeds-export-ban>>.

<sup>4</sup> Jakarta Globe, *supra* note 1.

<sup>5</sup> Antara News, "No More Lobster seeds Catching Fisheries Minister Says" online: <<https://en.antaranews.com/news/128900/no-more-lobster-seeds-catching-fisheries-minister-says>>.

<sup>6</sup> *Ibid*.

<sup>7</sup> Jakarta Globe, *supra* note 1.

<sup>8</sup> Jakarta post, "Lobster Smuggling Attempt Thwarted at Soekarno Hatta Airport" online: <<https://www.thejakartapost.com/news/2019/03/17/lobster-smuggling-attempt-thwarted-at-soekarno-hatta-airport.html>>.

In December 2019, Banyuwangi local police arrested five suspects of 7,050 lobster seeds smuggler. The police confiscated four styrofoam boxes, 22 plastic bags containing lobster seeds, and two cars used for translocating the lobster seeds.<sup>9</sup>

The Indonesian government has prevented the smuggling of 245,102 lobster seeds. With the help of the Fleet One Quick Response Task Force of the Joint Fleet Command I, the smugglers were caught in Batam. The smuggler carried 44 cork cooler containing lobster seeds, packed into 1,320 plastic bags. They were planning to smuggle the goods on a speedboat. Forty-one one out of the 44 cooler boxes contained 235,438 seeds of sand lobsters, and the other three cooler boxes contained 9,664 pearl lobster seeds. The estimated sale value of this catch is IDR 37.2 billion (approx. USD 2.6mn).<sup>10</sup>

The government has managed to prevent the smuggling of illegal lobster seeds valued at IDR 37.53 billion in Jambi and avert major losses to the state. Some 246,673 lobster seeds, comprising 235,900 seeds of sand lobsters and 10,773 seeds of pearl lobsters, were confiscated through the combined efforts made by a joint team of East Tanjungabung Police Criminal Investigation Unit and the Fish Quarantine Station, Jambi Quality Control and Fisheries Control (SKIPM). The incident came to light during police patrolling around Lambur Luar Village, East Sabak Sub-district, East Tanjungabung District, Thursday, in the morning of Apr 18. Results of the inspection revealed that lobster seeds were packaged in 1,238 plastic bags placed in 35 styrofoam boxes.<sup>11</sup>

Police in Indonesia's East Java province have disrupted an attempted smuggling operation of rare lobster seeds offshore and arrested seven suspects. In a raid at a warehouse, the police seized 5,000 seeds of pearl lobster (*Panulirus Versicolor*) and 32,000 seeds of sand lobster (*Panulirus Homarus*). Both of the seeds are protected by the Indonesian government, partly to maintain their population.<sup>12</sup>

The cases above prove that the act of lobster seeds smugglings as illegal fishing, which not only destroys the fish resources and its environment but also reduces potential state revenue drops, is still ensuing despite prohibited by law. The minister argued that these lobster seeds smugglings happened due to the existence of the export ban policy. On the contrary, the minister's proposal of lobster seeds export ban policy revocation reduces the lobster seeds smugglings, but it has the potential to damage the lobster ecosystem. As stated above, this study offers another perspective, which is the formulation policy study, to improve the lobster seeds smugglings enforcement without the risk of the lobster ecosystem destruction. Therefore, this study aims to analyze further about how the penal policy perspective of lobster seeds smuggling regulated in Indonesian law in order to optimize the effectiveness of illegal fishing enforcement, considering penal policy is the basis of criminal law operationalization. The said

<sup>9</sup> KKP, "Sebanyak 7.050 Berhasil Diamankan Polresta Banyuwangi" online: <<https://kkp.go.id/bkipm/artikel/16086-sebanyak-7-050-berhasil-diamankan-polresta-banyuwangi>>.

<sup>10</sup> Marsecreview, "Lobster seed smuggling operation worth approx. 2.6M USD disrupted in Indonesia" online: <<http://www.marsecreview.com/2019/03/lobster-seed-smuggling-operation-worth-approx-2-6m-usd-disrupted-in-indonesia/>>.

<sup>11</sup> Antara News, "Government Thwarts attempt to smuggle Lobster Seeds Worth Rp 37 Billion" online: <<https://en.antaranews.com/news/124004/government-thwarts-attempt-to-smuggle-lobster-seeds-worth-rp37-billion>>.

<sup>12</sup> Marsecreview, "Indonesia Disrupts Attempted Smuggling of rare Lobster Seeds" online: <<http://www.marsecreview.com/2019/06/indonesia-disrupts-attempted-smuggling-of-rare-lobster-seeds/>>.

formulation policy of lobster seeds smuggling enforcement, which is Article No. 88 jo Article 16 Paragraph (1) of Law No. 45 of 2009 amending Law No. 31 of 2004 concerning Fishery, and the draft of the fishery law, will be analyzed by three aspects which are the conduct (the criminal offense), the criminal liability, and the sentencing system. This research uses both statute approach and conceptual approach as legal research methods to analyze the issued legal problem. The statute approach is a process of elaborating on the provisions and regulations concerning the said legal issue. As for the conceptual approach, this study will refer to the law and several doctrines relating to the raised problem. Both approaches are used not only to analyze the issued legal problem but also to present the solution of it.

## II. FORMULATION POLICY AS A PART OF PENAL POLICY

Marc Ancel, as referred by Barda Nawawi Arif, stated that in modern criminal science, there are three main components of study in criminal law, namely; "Criminology," "Criminal Law," and "Penal Policy." Hence, to realize a reasonable, progressive and realistic criminal law it is necessary to have an integrated collaboration between scientists (scholars) with practitioners (practitioners), between experts on crime (criminologists) with advocate or lawyers, so that prevention ideas can be united crimes with legal engineering ideas in the process of designing criminal law.<sup>13</sup> Robert R. Mayer and Ernest Greenwood described the policy as a provision outlining the most effective and efficient way to achieve a collected aim.<sup>14</sup> Regarding criminal law as public law, the policy made to protect people's legal interest.<sup>15</sup> Sudarto adduced three meanings of penal policy, first, in limited-term, penal policy described as principles and methods used as base of illegal act reaction, which is a penalty. Second, in the broader term, the penal policy is the entirety roles of law enforcers, including court proceedings and police procedures. Third, In the broadest term, penal policy interpreted as a whole policy executed through regulations and official bodies in order to uphold society's primary norms.<sup>16</sup>

Marc Ancel provides an understanding of "penal policy" as a science of art which aims to enable legislation in criminal law to be better formulated and progressive so

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<sup>13</sup> Mokhammad Najih, "Indonesian Penal Policy: Toward Indonesian Criminal Law Reform Based on Pancasila," (2018) *Journal of Indonesian Legal Studies (JILS)*, 3 (2): 149-174.

<sup>14</sup> Barda Nawawi Arief, *Kebijakan Legislatif dalam Penanggulangan Kejahatan dengan Pidana Penjara*, retrieved from Elmayanti, "Kebijakan Legislatif Dalam Penanggulangan Kejahatan Melalui Pembaruan Pelaksanaan Pidana Penjara dengan Sistem Pemasyarakatan di Indonesia," online: <<http://repository.unand.ac.id/19954/1/KEBIJAKAN.pdf>>.

<sup>15</sup> L. J. Van Apeldoorn, *Pengantar Hukum Indonesia*, (Jakarta: Pradnya Paramita, 2000) at 171 retrieved from Heru Suyanto and Khoirur Rizal Lutf, *Model Kebijakan Penal terhadap Kejahatan Pertambangan yang Disebabkan Kebijakan Pemerintah (Studi Tambang Pasir Besi di Kabupaten Lumajang)*, *Jurnal Hukum Republica*, Vol. 17 No. 1 (2017).

<sup>16</sup> Sudarto, *Kapita Selekta Hukum Pidana*, (Bandung: Alumni 1981), at 1-2 retrieved from Agus Sudaryanto and Purnawan D. Negara, *Kebijakan Formulatif Tentang Tindak Pidana Pilkada dalam Perspektif Pemilihan Kepala Daerah Yang Demokratis Dan Transparan*, *Jurnal Konstitusi*, Vol. III, No.1, June 2010.

that it does not only provide guidance to the lawmakers, but also to law enforcers who carry out relevant legislation.<sup>17</sup> Penal policy, as a whole process of criminal law operationalization, has three stages, which are defined as formulation, application, and execution. Formulation is the stage that is regulated by the legislative council to determine criminal law, such as the enactment of lawless acts and its punishments. Application is the criminal law implementation, including the penalty imposition by the judge to the offenders (person or corporation) due to their wrongdoings that is carried out by the judicative branch. As for execution as the last stage of criminal law operationalization where law enforcers execute the executive power does the offenders (person or corporation) based on their received punishments.<sup>18</sup>

This research's analysis is limited to the formulation policy stage since it is the crucial phase composing the penal system and sentencing law policy, used as the basis of the next two stages. The statute has a core role in the criminal justice system due to its authority to give the policymakers the power and provide a legal basis to the implemented policy.<sup>19</sup> When the criminal policy uses penal as eradication efforts, its utilization should be more careful, frugal, selective, and restrictive. It also shall consider several things such as, *first*, the utilization of criminal law should reflect Indonesia's development purpose, which is achieving a fair and prosperous society that materially and spiritually even, based on Pancasila. Therefore penal law shall be used as a tool to eradicate offenses for the sake of society's prosperity and protection. *Second*, the deliberate cost-benefit principle of penal to measure whether the cost of criminalization is worth more than the received result or not, and *lastly*, the capacity of law enforcers to make sure no overbearing happens.<sup>20</sup>

### III. FORMULATION POLICY ON LOBSTER SEEDS SMUGGLING IN INDONESIA

As an archipelagic state having a significant part of its territory consisting of seas, Indonesia possesses a vast and variety of fish potential. The possessed fishery potential constitutes an economic potential that can be utilized for the nation's future as a backbone for the national development. The utilization there-of shall be directed optimally to the utilization of fish resources by observing the available support power and its conservation to improve the prosperity of the people, to improve the living standard of minor fishers and minor fish cultivators, increase the receipt of foreign exchange for the state, expand work opportunities, increase productivity, added value and competitive power of fishery products, and to ensure the conservation of fish

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<sup>17</sup> Barda Nawawi Arief, *supra* note 13.

<sup>18</sup> Kholiq, et. al., *Pidana Penjara Terbatas: Sebuah Gagasan dan Reorientasi Terhadap Kebijakan Formulasi Jenis Sanksi Hukum Pidana di Indonesia*, Jurnal Law Reform Volume II, Nomor 1, Tahun 2015.

<sup>19</sup> Soerjono Soekanto, *Pengantar Penelitian Hukum*, (Jakarta, Universitas Indonesia, 2006) at 132.

<sup>20</sup> Sudarto, *Hukum dan Hukum Pidana*, (Bandung: Alumni, 1977), at 44-48 retrieved from Trisno Raharjo, *Kebijakan Legislatif dalam Pengaturan Hak Kekayaan Intelektual Dengan Sarana Penal* (Yogyakarta: Penerbit Kantor Hukum, 2006) at 36-37.

resources, fish cultivation area, and spatial layout. These issues mean that the utilization of fish resources must be in a balance worth its support power; hence it can be expected to provide an everlasting benefit. Therefore, a legal basis is required for the fish resources management to be able to contain all management aspects of fish resources and to anticipate the development of legal requirements and technology.<sup>21</sup>

On the other hand, several cases mentioned above indicated that lobster seeds smugglings, which not only destruct the fish resources and its environment but also reduce potential state revenue drops, are still ensuing in Indonesia. Thus, this fact proves that lobster seeds smuggling enforcement in Indonesia is ineffective. Hence, this study will thoroughly analyze how lobster seeds smuggling ruled in fishery law from penal policy. The fishery law in Indonesia regulated in Law No. 45 of 2009 amending law no. 31 of 2004 concerning Fishery. Based on Article 2 of the fishery law, Management of fishery shall be performed based on the principles of benefit, justice, togetherness, partnership, independence, even distribution, integrity, transparency, efficiency, perpetual preservation, and continuous development.

Moreover, the core aim of fisheries law is to strike an appropriate balance between exploiting and conserving fish by creating decision-making processes and regulations to control access to fisheries resources and the methods by which they can be taken. The development of fisheries law is influenced by various theories and competing objectives about how public resources should be managed and used.<sup>22</sup> For example, Indonesian Ministry of Marine Affairs and Fisheries through Ministry Regulation Number 1 Year 2015 about Lobster (*Panulirus* spp.), Crab (*Scylla* spp.) and Blue Crab (*Portunus Pelagicus*) capture, has asserted in article 3 about the allowed capture size (capture size allowed is lobster with the length of carapace above 8 cm and also required to rerelease of marine species in spawning condition). This regulation was issued because, as WWF Indonesia stated, lobster seeds exploitation is very detrimental to fisheries since ecologically, this condition contributes to the negative impact on the lobster sustainability and juvenile cause the recruitment overfishing, threatening the sustainability of lobster stocks in natural life.<sup>23</sup> Generally speaking, fisheries resources may cease being exploited for commercial, recreational, or cultural purposes if laws are too heavily skewed in favor of conservation. However, the future of the resources, and the industries and livelihoods dependent on them, maybe permanently jeopardized if fisheries laws cannot guard against unsustainable fishing practices.<sup>24</sup>

<sup>21</sup> Elucidation of the Fishery Law.

<sup>22</sup> R.L Stephenson and D.E. Lane, "Fisheries Science In Fisheries Management: A Please for Conceptual Change" (1995) *Canadian Journal of Fisheries and Aquatic Sciences* 2015-6; D.E Lane and R.L Stephenson, "Institutional Arrangements For Fisheries: Alternate Structures And Impediments to Change" (2000) 24 *Marine policy* 385-93; R Mahon, P McConney and R N Roy, 'Governing Fisheries As Complex Adaptive Systems' (2008) 32 *Marine Policy* 104-12, retrieved from Warwick Gullet, *Fisheries law in Australia*, 1<sup>st</sup> Edition, (Australia: LexisNexis Butterworths, 2008) at 1.

<sup>23</sup> Adrian Damora, "Will It Be The End for Lobster?" online: <[https://www.wwf.or.id/en/news\\_facts/new\\_articles/?37942/Will-It-Be-The-End-for-Lobster](https://www.wwf.or.id/en/news_facts/new_articles/?37942/Will-It-Be-The-End-for-Lobster)>.

<sup>24</sup> Warwick Gullet, *supra* note 22.

The fishery law introduces penal sentences as one of the enforcement instruments in the attempt to prevent and eradicate illegal fishing, including lobster seeds smuggling. Therefore, it is the formulation policy of lobster seeds smuggling enforcement, especially Article 88 *jo* Article 16 paragraph (1), that will be analyzed by three aspects, which are the conduct (the criminal offense), criminal liability, and sentences. The Article 16 paragraph (1) regulates the prohibition of not introduce, exit, procure, distribute and/or cultivate fish that harm the society, fish cultivation, fish resources and/or fish resource environment to and/or from the Indonesian fish cultivation territory meanwhile the Article 88 regulates the penal punishment, which is imprisonment of maximum 6 (six) years and monetary charge of maximum IDR 1.500.000.000,00, for those who infringe the said prohibition.

Firstly, the criminal offense. Regulating an act as a criminal offense (criminalization) on particular law is aim to actualize the heading of law-making. The purpose of this Law concerning Fishery, as stated in its consideration, is to oversee the conservation of potential fish resources and its environment based on existing support and its sustainability through fish resources supervision and optimal law enforcement for attaining public welfare and prosperity. Thus, it can be concluded that the violation of those articles, including lobster seeds smuggling, can be categorized as illegal fishing emphasizing on protection against pollution and damage of fish resources and its environment. Thus, those articles regulated not only to manage fish resources utilization but also to cultivate and preserve it. To conclude, those articles have been oriented on the conservation of fish resources and its sustainability for regulating the prohibition of lawless act inflicting damage to fish resources and its environment, in accordance with the aim of this fishery law.

Moreover, the government through Article 7 of Minister Decree No. 56/permen-kp/2016 concerning the ban of catching and/or releasing lobster (*panulirus spp.*), crab (*scylla spp.*), and small crab (*portunus spp.*) from Indonesian territory, affirmed the prohibition of lobster seeds smuggling as declared by paragraph (1) of the said article. Furthermore, paragraph (2) of the said article regulates the measures in case someone captures lobster (*Panulirus spp.*), Crab (*Scylla spp.*), and small crab (*Portunus spp.*) which are release those lobster which is discrepant with the provisions as ruled by article 2, article 3, and article 4, if alive yet, or noting down those lobster which is discrepant with the provisions as ruled by article 2, article 3, article 4, that were caught dead and reporting to General Director through the head of the port base as stated in the Fishing Permit License, meanwhile paragraph (3) mentions that every person who takes out those lobster in conditions that are discrepant with the provisions as ruled by article 2, article 3, article 4, shall be imposed the sentences under regulations.

In the meantime, lobster seeds smuggling act also being regulated in Article 144 *jo* Article 116 paragraph (1) *jo* Article 6 paragraph t of the draft of the fishery law. These articles mention that the Minister shall declare the fishes that are prohibited from being traded, introduced, and exited into and/or from the Indonesian Fish Cultivation Territory thus every person who, intentionally, violating the ban of trading,

introducing, and/or exiting fishes that are prohibited from being traded, introduced, and exited into and/or from the Indonesian Fish Cultivation Territory will be penalized with imprisonment of maximum 5 (five) years and monetary charge of maximum IDR 7.000.000.000,00.

To sum up, lobster seeds smuggling is being regulated as illegal fishing in both current laws concerning fishery and the draft (the future formulation policy of lobster seeds smuggling). Nevertheless, there are some differences in the text as compared in the table below:

Article 88 of Law No. 45 of 2009 on Fishery	Article 144 paragraph (1) of the draft of Law on Fishery
Every person	Every person
intentionally	intentionally
introduces, exits, procures, distributes and/or breeds	violating the ban of trading, introducing, and/or exiting
fish causing damage to the society, fish breeders, fish resources and/or the environment	fishes that are prohibited from being traded, introduced and exited
into and/or from the Indonesian Fish Cultivation Territory	into and/or from the Indonesian Fish Cultivation Territory
imprisonment of a maximum of six years and monetary charge of maximum IDR 1.500.000.000,00	Imprisonment will be applied for a maximum of five years and a monetary charge of maximum IDR 7.000.000.000,00.

The table above showed that lobster seeds smuggling regulation in article 88 is material offense (*Materieel Delict*). Meanwhile, in article 144 (1), it is a formal offense (*Formeel Delict*). Therefore, Article 88 can be charged if the consequence of wrongful conduct has been proven, whereas Article 144 (1) applied otherwise. However, both articles are classified not as a fishing violation (similar to a misdemeanor in Indonesia penal code/ KUHP), but fisheries offense (similar to a felony in Indonesia penal code/ KUHP), according to article 103 of fishery law and article 157 of the draft of fishery law respectively. The felony/misdemeanor classification is the most common and most important classification of crime.<sup>25</sup> Numerous sentencing considerations could result in the scenario where the person convicted of a misdemeanor (or lower degree of crime) receives a harsher sentence than the felony (or higher degree of crime) defendant. A sentencing judge after considering the gravity of the offense, which is typically reflected by the type and degree of the offense, must normally next consider aggravating and mitigating factors.<sup>26</sup>

<sup>25</sup> Thomas J. Gardner and Terry M. Anderson, *Criminal Law*, Tenth Edition, (United States of America: Thomson Wadsworth, 2009) at 15.

<sup>26</sup> Arthur J. Cohen Esq, *Felony and Misdemeanor Convictions –Does (or Should) the Label Make Any Difference in the Hiring Process?* online: <<https://ohsonline.com/-/media/D91AE421A3BA403EBB40BEDB7FCE1A91.pdf>>.



Secondly, criminal liability. Discussing criminal liability can not be separated from a legal person's study. As shown in the table above, both articles have the same offense's element, which is *every person* (legal persons), yet have a different meaning in terms of criminal responsibility. The element of *every person* in Article 88 of fishery law refers to natural person or corporation, as mentioned in Article 1 Paragraph 14 of the fishery law, meaning they can commit fisheries offenses; hence they should be held criminally liable for it. However, Article 101 of the fishery law stated otherwise which is in case the criminal acts, including lobster seeds smuggling, are committed by a corporation, the claims and penalty will be imposed on its managers plus a monetary charge of 1/3 (one-third) of the penalty imposed. Furthermore, the Fishery Law recognizes corporations as the subject of criminal law, but the prosecution and the criminal sanction (the fines) will be imposed on the directors of corporations.<sup>27</sup> In summary, the corporation unable to be held criminally liable for fisheries offenses, such as lobster seeds smuggling, despite avowed as a legal person of fishery law.

Refers to several cases mentioned above, illegal fishing is mostly committed in order to gain profit. Under the illegal fishing, including lobster seeds smuggling, the attitude is an economic crime driven by growing world demand for fish and other seafood, and the globalization of the market. Some fishers skirt the law in pursuit of higher catch, taking advantage of patchy regulation of the commercial fishing industry and weak enforcement regimes at sea.<sup>28</sup> Moreover, up to Rp 900 billion (\$24 million) of fund transfers from abroad for financing lobster seeds smuggling that was discovered by The Financial Transaction Reports and Analysis Center (PPATK) was suspected of involving international syndicate.<sup>29</sup> The said international syndicate allegedly counted in corporations as both exporter and importer expecting a considerable sum of money; hence this cost a significant loss of state finances. Hence, the corporation should be held criminally liable for committing fisheries offenses.

In fact, Catherine Elliott and Frances Quinn had already proposed several reasons for imposing corporate criminal liability, which were (1) without it, companies might escape regulation by the criminal law, and individuals could be prosecuted for offences which were really the fault of company practices, (2) In some cases, it is more convenient for procedural purposes to prosecute a company rather than its employee(s), (3) where an offence is serious, a company may be more likely to be able to pay the required level of excellent than an individual employee would be, (4) The threat of criminal prosecution may encourage shareholders to exercise control over the activities of companies in which they invest, (5) If a company has made a profit through an illegal practice, it should be the one to pay the price, not an employee, (6) Corporate liability can discourage companies from putting pressure on employees, directly or indirectly, to raise profits by acting illegally – for example, if a haulage firm sets its

<sup>27</sup> Maradona, *Corporate Criminal Liability in Indonesia: Regulation, Implementation and Comparison with The Netherlands*, Thesis, Erasmus University Rotterdam, online: <<http://mappifhui.org/wp-content/uploads/2016/12/Pertanggungjawaban-Korporasi-dalam-Rancangan-KUHP.pdf>>.

<sup>28</sup> The Pew Charitable Trusts, *FAQ: Illegal, Unreported, and Unregulated Fishing*, 2013.

<sup>29</sup> Jakarta Globe, *supra* note 1

drivers targets for delivery times that those drivers could not meet without speeding, imposing corporate or vicarious liability would be a way of ensuring that the company does not get off scot-free if the driver is charged with speeding, (7) Adverse publicity and fines may act as a deterrent against acting illegally – this might not be the case if an individual was prosecuted.<sup>30</sup>

In addition, as a legal entity, although a corporation is not a living person and thus would seem to lack the “capacity” to commit a crime, it acts through human beings. Thus, for a crime committed by a person to be attributable to the corporation, the person must be in control of the corporation’s affairs or in the employment of the corporation. The rules for making corporations liable for actions taken by officers, directors, or employees. Corporations can be vicariously criminally liable for actions of their agents if the offense is minor, a duty is specifically assigned to a corporation, a statute explicitly creates vicarious criminal liability, or the person committing the crime is acting in the interest of the corporation and is a high managerial agent.<sup>31</sup>

On the other hand, there are significant theoretical and practical difficulties associated with imposing liability for environmental harm upon corporations, including environmental damage caused by lobster seeds smuggling, in particular those involved in Multinational Enterprises (MNEs). Their complex, transnational structures ensure that MNEs can be challenging to track, let alone pin, down. They can locate their facilities where environmental regulation is weak or not enforced; or, when faced with the threat of litigation, ‘shop’ for a forum in which their liability to victims is likely to be relatively low, or where court procedures are more likely to stall. When cornered, MNEs are often able to use the principle of limited liability to keep their resources out of the reach of creditors. However, many of these difficulties are legal constructs. All the more, the corporate form is a legal construct and, as such, can be molded, or even dismantled, by legal reform. Whether these difficulties are surmounted is, in no small degree, dependant upon the prevailing political wind.<sup>32</sup>

Apparently, the draft of fishery law not only recognizes corporation as a legal person but also can be held criminally liable, as the article 1 paragraph 26 and article 153 paragraph (1) stated that every person is any natural person or corporation, either in the form of a legal entity or not, thus in case that the criminal offenses are committed in the name of, or on behalf of a corporation, the penalty will be imposed on the corporation and/or its managers. The comparisons of corporate criminal liability regulation between current fishery law and the draft of it can be seen below:

<sup>30</sup> Catherine Elliott and Frances Quinn, *Criminal Law*, 8<sup>th</sup> edition, (England: Pearson Education Limited, 2010) at 308.

<sup>31</sup> Thomas J. Gardner, Terry M. Anderson, *supra* note 20 at 98-99.

<sup>32</sup> Perry-Kessaris, A (forthcoming), ‘Corporate liability for environmental harm’ in Fitzmaurice, M, and Ong, D, eds, *Research Handbook on International Environmental Law*, (Cheltenham: Edward Elgar, 2010), online: <<https://www.researchgate.net/publication/42538463>>.

	Fishery Law of 2009	The draft of Fishery Law
Corporate as a legal person	v	v
Corporate is criminally responsible for a criminal offense	-	v

The last aspect analyzed is the sentencing system of the lobster seeds smuggling act, mainly focused on the lack of a specific minimum penalty and the urgency of double track system implementation. First of all, the lack of a specific minimum penalty. Regarding lobster seeds smuggling, Article 88 of fishery law regulated it as material offense (*Materieel Delict*), whereas in article 144 (1) of the draft, it is categorized as formal offense (*Formeel Delict*). Consequently, the imprisonment regulated in current fishery law is slightly harsher than the draft, which is six and five years, respectively, since the former requires proved outcome of the offense while the latter demands otherwise. Nevertheless, the proposed fines in the draft are higher Rp 5.5 billion than the current fishery law. Hopefully, this moderate-higher fines can deter upcoming potential lobster seeds smuggling, considering it is an economically motivated offense that pursuing profit. Besides, lobster seeds smuggling can be detrimental to fishery resources and destructing lobster sustainability, as in the capacity for continuance more or less indefinitely into the future,<sup>33</sup> therefore the lobster export rate will be decreased, as well as GDP growth.

However, instead of enacting the specific minimum penalty (minimum levels of fines and imprisonment), both articles only determined the maximum penalty (maximum levels of fines and imprisonment). Hence, any fisheries crimes, including lobster seeds smuggling, use general minimum imprisonment penalty regulated in Article 12 Paragraph (2) Indonesian Criminal Code or Kitab Undang-Undang Hukum Pidana (KUHP)<sup>34</sup>, which is unfit for certain crimes triggered by economic purpose and has severe potential damage to society and the environment, including lobster seeds smuggling. Furthermore, after the provision of both Government Regulation in Lieu of Acts No. 16 and No. 18 of 1960, all fines penalty of KUHP interpreted in Rupiah and doubled by the fifteenth. Thus, the general minimum fines based on KUHP is IDR 3,75. Based on cost-benefit analysis (CBA), involves a comparison of the economic costs and benefits of proposed regulations, projects or policies, only measures that are

<sup>33</sup> Paul Ekins, *Economic Growth and Environmental Sustainability: The prospects for green growth*, (London: Routledge, 2000) at 70.

<sup>34</sup> The general minimum imprisonment penalty is one day, as in 24 hours.

demonstrated to be efficient, that is to create more benefit than cost, are pursued: 'The basic rule is not to sanction anything where the costs exceed the benefits'<sup>35</sup>

For this reason, fishery law shall regulate the specific minimum penalty to diminish the possibility of law enforcement cost is more significant than the benefit, due to low fines penalty implementation, since the expense to recover the damaged environment is quite costly too. Furthermore, Skinnider, as referred by Nigel South, points out, "Environmental crime affects all of society" and "can have detrimental consequences on the economies and security of a country." Harms and damages can be felt immediately or only in the long-term. They may be 'direct or indirect,' their causes may arise in many different ways, their origins may be 'point source or diffuse,' their effects maybe 'individual or cumulative,' 'local, trans-boundary or global,' and those responsible might be individuals, groups, corporations, governments or criminal enterprises.<sup>36</sup> Over the past few decades, awareness of the *financial* as well as human costs of environmental damage has increased, and this has registered with some who are not otherwise environmentally 'green.'<sup>37</sup>

In addition, the other purpose of regulating a specific minimum penalty is to avoid the sentencing disparity. Defining sentencing disparity as a situation in which similar offenders are treated differently, or different offenders are treated the same is overly simplistic. There are several different types of sentencing disparity, and not all sentencing disparities are equally problematic, which are, *first*, inter-jurisdictional, where judges in different jurisdictions sentence similarly situated offenders differently. *Second*, intrajurisdictional, when the judges in the same jurisdiction sentence similarly situated offenders differently meanwhile *the last*, intrajudge means an individual judge makes inconsistent sentencing decisions.<sup>38</sup>

Besides, some argue that empirical evidence of differential sentencing practices based on demographic factors is indicative of illegal discrimination.<sup>39</sup> Their issue is not just with overtly discriminatory practices. The *Booker* decision increased ambiguity in the exact reasons for district court decisions and thereby multiplied the potential for implicit discrimination, meaning unconscious and unintentional discrimination in

<sup>35</sup> David Pearce and Edward B. Barbier, *Blueprint for a Sustainable Economy* (Earthscan, 2000), at 54 retrieved from Jane Holder and Maria Lee, "Environmental Protection, Law and Policy," Second Edition, (United Kingdom: Cambridge University Press, 2007) at 37-38.

<sup>36</sup> Skinnider, E., *Effect, issues, and challenges for victims of crimes that have a significant impact on the environment*. (Vancouver: International Centre for Criminal Law Reform and Criminal Justice Policy, 2013), retrieved from Nigel South, *Green Criminology, Environmental Crime Prevention and the Gaps between Law, Legitimacy and Justice*, *Revija za kriminalistiko in kriminologijo/Ljubljana* 65/2014/4 at 373–381.

<sup>37</sup> *Ibid*.

<sup>38</sup> "Sentencing Disparity and Discrimination: A Focus on Gender," online: <[https://us.sagepub.com/sites/default/files/upm-assets/27008\\_book\\_item\\_27008.pdf](https://us.sagepub.com/sites/default/files/upm-assets/27008_book_item_27008.pdf)>.

<sup>39</sup> Pina-Sánchez & Linacre, *supra* note 6, at 72; Hofer at al., *Sentencing Guidelines*, *supra* note 12, at 242. Retrieved from Melissa Hamilton, "Sentencing Disparities," *British Journal of American Legal studies*, Volume 6: Issue 2, 2017.

individual cases.<sup>40</sup> Thus, implicit discrimination might arguably be present when studies show that females and whites, for instance, routinely receive lesser punishments than males and blacks, respectively, after controlling for relevant legal factors.<sup>41</sup> Variations in sentencing practices may be signs not only of inequality and injustice, but they also undermine the deterrence value of predictable and firm sentencing policies.<sup>42</sup>

Second of all, it is the urgency of double-track system implementation. The fishery law, including Article 88 regulating lobster seeds smuggling, only enacted imprisonment and fines as criminal punishments, without penal measures, meaning the sentencing of lobster seeds smuggling use a single-track system. In other words, the sentencing system of lobster seeds smuggling does not implement a double-track system due to a lack of penal measures. The basic idea of the double-track system is "Equality Between Criminal Sanctions and Penal Measures." This idea of equality can be traced from development in criminal law sanctions system of streamflow to Modern Classical and Neo-Classical Flow.<sup>43</sup>

Penal measures arose from an idea of what is the purpose of sentencing; therefore, penal measures appeared slightly anticipatory to the offenders. The sole of penal measures is focused on the efforts to aid the perpetrators to be better persons.<sup>44</sup> Moreover, penal measures are more social-centered<sup>45</sup> Moreover, have preventive means hence aim to educate rather than punish.<sup>46</sup> Accordingly, there are several differences between Criminal Sanctions and Penalties Measures, which are *firstly*, Criminal sanctions stem from the basic idea of "Why is it held convictions" meanwhile, sanctions measures departed from the basic idea of "For what it has held Punishment." *Secondly*, criminal sanctions being reactive to an act, whereas the action is more antipathic sanctions against the perpetrators of such acts. *Thirdly*, criminal sanctions more emphasis on the element of vengeance while sanctions measures stressed on the basic idea of community protection and guidance, and *lastly*, criminal sanctions focused on a criminal who applied for the crimes committed whereas the sanctions measures have social goals.<sup>47</sup>

Consequently, the lack of penal measures in fishery law is the result of the absence of corporate criminal liability, considering penal measures in another

<sup>40</sup> Andrew W. Nutting, *The Booker Decision and Discrimination in Federal Criminal Sentences*, 51 ECON. INQUIRY at 638-39.

<sup>41</sup> *Ibid* at 645.

<sup>42</sup> Stephanos Bibas, *Regulating Local Variations in Federal Sentencing*, 58 STAN. L. REV. 137, 137 (2005) at 137.

<sup>43</sup> Carto Nuryanto, "Reconstruction Of The Criminal Sanction Policy And Action (Double Track System) In Law Enforcement For Narcotic Crime Prevention Referred To Religious Justice," *Jurnal Pembaharuan Hukum* Volume V No.3 September - December 2018.

<sup>44</sup> M. Sholehuddin, *Sistem Sanksi Dalam Hukum Pidana*, Edisi Pertama, (Jakarta: Rajagrafindo Persada, 2004) at 17.

<sup>45</sup> J.E Jonkers, *Buku Pedoman Hukum Pidana Hindia Belanda*, (Jakarta: Bina Aksara) at 350.

<sup>46</sup> Utrecht, *Rangkaian Sari Kuliah Hukum Pidana II*.

<sup>47</sup> Sholehuddin, *Double Track System Dan Implementasinya*, (Jakarta: Rajawali Pers, 2004) at 11 retrieved from Carto Nuryanto, *supra* note 36.

regulation are usually applied to corporations as a legal person. If corporate criminal liability enacted in the fishery law, as stated above, consequently, penal measures can be regulated into the law in order to exteriorize the balance of fish resources sustainability and public welfare. Evidently, as the draft of fishery law has already regulated the penal measures, in the form of secondary sanctions, according to Article 154 Paragraph 2, considering the draft has sets corporate criminal liability as well. The said article regulates that several penal measures shall be applied to a corporation, which are, court's decision will be announced publicly, assets freezing (in part or a whole), revocation of a business license under the provisions, corporate abolition and/or restriction, assets seizure for the state, and lastly, the state will take over the corporation.

#### IV. CONCLUSION

Fishery law aims to strike an appropriate balance between exploiting and conserving fish by creating decision-making processes and regulations to control access to fisheries resources and the methods by which they can be taken. Meanwhile, several cases mentioned above indicated that lobster seeds smugglings, which not only destruct the fish resources and its environment but also reduce potential state revenue drops, are still ensuing in Indonesia. Thus, this fact proves that lobster seeds smuggling enforcement in Indonesia is ineffective. For this reason, this research analyses how formulation policy perspective of lobster seeds smuggling regulated in Indonesian law in order to optimize the effectiveness of illegal fishing enforcement, considering penal policy is the basis of criminal law operationalization. Fishery law in Indonesia regulated in Law No. 45 of 2009 amending Law No. 31 of 2004 concerning Fishery, especially Article No. 88 *jo* Article 16 Paragraph (1) which is the formulation policy of lobster seeds smuggling enforcement, and the draft of the fishery law, will be analyzed by three aspects which are the conduct (the criminal offense), the criminal liability, and the sentencing system.

Firstly, the criminal offense. Lobster seeds smuggling is being regulated in the fishery law is material offense (*Materieel Delict*). Meanwhile, in article 144 (1) of its draft, it is a formal offense (*Formeel Delict*). However, both articles are classified not as a fishing violation (similar to a misdemeanor in Indonesia penal code/ KUHP), but fisheries offense (similar to a felony in Indonesia penal code/ KUHP). Secondly, criminal liability. Based on the analysis above, corporations unable to be held criminally liable for fisheries offenses, such as lobster seeds smuggling, despite avowed as a legal person of fishery law.

Nonetheless, the draft of fishery law not only recognizes corporations as a legal person but also can be held criminally liable. The last aspect that will be analyzed is the sentencing system of the lobster seeds smuggling act, mainly focused on the lack of specific minimum penalty and the urgency of double track system implementation. Instead of enacting the specific minimum penalty (minimum levels of fines and imprisonment), both the fishery law and its draft regarding lobster seeds smuggling

only determined the maximum penalty (maximum levels of fines and imprisonment). Furthermore, the fishery law only enacted imprisonment and fines as criminal punishments, without penal measures, as the consequence of the lack of corporate criminal liability, considering penal measures in another regulation is usually applied to corporations as a legal person. Evidently, as the draft of fishery law has already regulated the penal measures, in the form of secondary sanctions, considering the draft has sets corporate criminal liability as well.

This research encourages other researchers to analyze more in-depth about illegal, unreported, unregulated fishing (IUUF) enforcement policy, especially lobster seeds smuggling, based on the ecocentrism to attain sustainable fishing by accommodating it into Indonesia fishery law. As we know that ecocentrism relies on nature balances and encourages moral awareness to improve damaging nature behavior. Moreover, ecocentrism recognizes not only environment utilization based on its capacity but also human duties towards the environment, including the fisheries ecosystem. Therefore, there is a need to research further how to accomplish fishery law enforcement effectiveness, precisely formulation policy as the basis of law enforcement, that promote nature-friendly behavior based on the ecocentrism studies.

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